NOTES ON SUITS BETWEEN STATES: KANSAS *v.* COLORADO. II.

III.

KANSAS *v.* COLORADO.

The Case Stated.

30. The bill of complaint in Kansas *v.* Colorado recites that the Arkansas River rises in Colorado, runs a long course therein, and then traverses Kansas in a course of three hundred and ten miles. It alleges that the State of Colorado itself, and many persons acting under its authority are, even now, diverting such quantities of water for irrigation purposes, "that no water flows in the bed of said river from the State of Colorado into the State of Kansas during the annual growing season, and the underflow of said river in Kansas is diminishing and continuing to diminish." But be it noted that for diversions under existing grants no relief is sought in the present suit. The gravamen of the bill is the allegation that Colorado intends to maintain the present diversion by renewing grants as they expire by limitation, and to increase it by new irrigation works, both public and private. And the bill asserts that if the diversion continues to increase, the bottom lands of the Arkansas Valley in Kansas "will be injured to an enormous extent, and a large part thereof will be utterly ruined, and will become deserted, and be a part of an arid desert."

31. Colorado demurs to the bill for ten specific causes. The seventh and tenth allege defects in pleading, and are not material to this general discussion. The first six causes present the objection that the bill does not disclose a controversy between States, within the meaning of the Federal Constitution. It is contended that any injury resulting from the acts complained of creates, at most, a controversy

between persons in Colorado who actually divert water, and persons in Kansas who suffer from the diversion. A like contention was made in Missouri *v.* Illinois, where a State sued on account of threatened depreciation of the quality of waters used by its citizens, a case not substantially different from a threatened diminution of supply, but the court said, "That suits brought by individuals, each for personal injuries threatened or received, would be wholly inadequate and disproportionate remedies requires no comment";[1] and this ruling is even more pertinent here, for in the Missouri case a multitude of suitors would at least have found a single defendant in the Drainage Canal Corporation, while here a multitude must essay the difficult, if not impossible, task of apportioning liability among a multitude of defendants in Colorado. Conceding that a State cannot properly implead another when adequate relief is otherwise obtainable, it is not perceived that the case at bar should be dismissed on this ground, and so we pass on to the question whether Kansas and Colorado are actually in controversy.

32. Kansas first alleges injury to a small tract of land, the site of a State reformatory. Here is a proprietary interest on account of which the State may bring suit, but, assuming for the moment the liability of Colorado, judgment on this score alone would be a technical victory for Kansas of little value. It would be intolerable to enjoin Colorado from bringing vast tracts of arid land into cultivation, merely to enable Kansas to raise vegetables on a reformatory farm.

The real motive of the suit lies in the allegation of damage threatened to a large section of territory held in private ownership. To avert this damage Kansas comes into court as a political corporation asserting a right to protect its community. If it be argued that as a State cannot collect debts due its citizens from another State[2] it cannot defend their landed interests, the sufficient answer in the case at bar is that the nature and magnitude of these collective interests make their preservation a matter of public concern. And, if the support of precise authority

[1] 180 U. S. 240. [2] *Supra*, Sec. 11.

be required for this statement, it may be found in Missouri *v.* Illinois, where the court said:

"It is true that no question of boundary is involved, nor of direct property rights belonging to the complainant State. But it must surely be conceded that, if the comfort and health of the inhabitants of a State are threatened, the State is the proper party to represent and defend them. * * * The health and comfort of the large communities inhabiting those parts of the State situated on the Mississippi River are not alone concerned, but contagious and typhoidal diseases introduced in the river communities may spread themselves throughout the territory of the State. Moreover, substantial impairment of the health and prosperity of the towns and cities of the State situated on the Mississippi River, including its commercial metropolis, injuriously affects the entire State."[1]

33. Beyond the public and private lands specified, there is really involved in this suit an interest which we hope the Supreme Court will place definitely among the rights of a State maintainable in interstate suits—a peculiar public interest in water, wholly independent of any private interest or right therein that may happen to be vested by local law, and which is not limited by the use actually made of water through diversion, but is defined so broadly that it will embrace even the maintenance of climatic conditions due to the presence of water. Always a State should be competent to assert this interest, except of course where it must yield to Federal power in respect of navigation.[2]

I conclude that the pleadings in the case at bar present a controversy between States. Kansas properly complains as well in its political, as in its proprietary capacity; Colorado is properly impleaded, because the diversions of water complained of are, and can be effected only through State authorization.

The Governing Principle.

34. Kansas and Colorado are now joined in controversy, and it is material to determine the governing rule. This inquiry necessitates an appreciation of some elementary principles of the law of waters affecting States of the Union both in their domestic administration and in their relations to the Federal Government and to other States. Of the first case it is sufficient to say that, of course, State con-

[1] 180 U. S. 241. [2] *Infra* Sec. 34.

trol over waters in respect of persons and property within its jurisdiction is determined by State laws.

Whatever may be the power of a State in respect of waters it must be exercised in subordination to that Federal authority derived from the commerce clause of the Constitution.

"The jurisdiction of the general government over interstate commerce and its highways," says the Supreme Court, "vests in that government the right to take all needful measures to preserve the navigability of the navigable water courses of the country, even against any State action."[1]

But in discussing the law of waters suitable to the great arid region of the United States we should leave this peculiar Federal interest in suspense. In this region irrigation is so vital, navigation, generally speaking, so negligible that the Federal Government is willing to permit, nay it should be eager to encourage the one with little regard for its effect on the other. And the government loses nothing by this partiality, for should a State actually divert waters to the injury of navigation it may intervene. Indeed it appears that in acts of Congress permitting States to authorize the cutting of ditches through public lands the privilege does not carry a right to impair navigation.[2]

35. Regarding the position of a State in respect of waters on public lands of the United States that may happen to lie within its borders the Supreme Court says:

"In the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far, at least, as may be necessary for the beneficial uses of the government property."[3]

But the question remains whether these public lands are so intimately connected with the sovereign, as distinguished from the proprietary interests of the United States, as to lie beyond the reach of the State's eminent domain. Personally I am of the opinion that these lands are not inevitably beyond the expropriating power of the States for all purposes.[4] I can conceive of cases where the public

[1] U. S. *v.* Rio Grande Irrigation Co. 174 U. S. 703.

[2] See U. S. *v.* Rio Grande Irrigation Co., 174 U. S. 706.

[3] U. S. *v.* Rio Grande Irrigation Co., 173 U. S. 703.

[4] See The Law of Eminent Domain, Sec. 59.

needs of a State should be held superior to the proprietary interests of the United States. But the point has not been determined by the Supreme Court,[1] and it is not necessary to discuss it here.

36. Coming to the measure of control over waters which one State can maintain against another, we find that in the case at bar Colorado arrogates the right to utilize every drop of water in that section of the Arkansas River basin lying within the State, regardless of the effect upon Kansas. This position is not merely a legal inference from the filing of a demurrer, and thus admitting, technically, the truth of the facts alleged in the bill of complaint: It is affirmed in the following causes of demurrer:

"*Eighth:* Because the acts and injuries complained of consist in the exercise of rights and the appropriation of water upon the national domain in conformity with, and by virtue of divers acts of Congress in relation thereto. *Ninth:* Because the Constitution of the State of Colorado declaring public property in the waters of its natural streams, and sanctioning the right of appropriation was enacted pursuant to national authority, and ratified thereby at the time of the admission of the State into the Union."

So far as the eighth cause refers to present diversions of water it is to be noted that the suit of Kansas is not aimed at any irrigation interests in Colorado which may be defined as "vested," and in this discussion we shall not consider at length such interests in either State, being concerned chiefly with the public matter in controversy.

So far as the eighth cause insinuates that Congress, in authorizing diversions of water on the public domain, confers upon a State a right exclusive against other States, it must be objected that Congress does not, indeed it cannot, thus exalt one State to the detriment of another. And the same objection rebukes the claim, advanced in the ninth cause of demurrer, that Congress, by approving the Constitution of Colorado, has consecrated a right in the State to withhold water from its neighbors.

Stripped of all support from Federal statutes, which, I repeat, cannot be invoked by one party to an interstate controversy as giving it legal advantage over another, it is perceived that Colorado is really insisting that this dispute

[1] See Van Brocklin *v.* Tennessee, 117 U. S. 161.

between two States shall be determined by the law of one —that the Constitution and statutes ordained by the people of Colorado for their own governance shall be accepted by the Supreme Court as the ruling law in a suit brought by Kansas. This position is untenable, as I have shown.[1]

37. Kansas opposes to Colorado's claim of monopoly what we may call a local theory of law, as distinguished from the general theory we shall consider later. This local theory is introduced by the statement that the land lying in Colorado and Kansas, and drained by the Arkansas River and its affluents was brought within the domain of the United States, partly by the Louisiana Treaty, and partly by treaty with Texas; that this land was included in the Territory of Kansas; that, later, a part was included in the State of Kansas and the remainder in the Territory, afterwards the State of Colorado. It is alleged that under the sovereignty of the United States the land became subject to the common law, and especially to the general rule that every riparian owner is entitled to the continued natural flow of a stream. And it is argued that when a section of United States territory is once subjected to this common law rule the subsequent drawing of State lines across it leaves the old rule still effective as between the new States.

Even assuming that this argument would lead to a just decision in the case at bar I am not sure that it would furnish a rule applicable throughout the republic. Suppose that after the Territories of New Mexico and Arizona are admitted to statehood a controversy like Kansas *v.* Colorado should arise between them, and it was found that the common law rule did not prevail in that section of country prior to the admission of the States. Should the complaining State fail for this reason? If so, there is no uniform rule for the determination of interstate controversies in respect of waters. Yet a uniform rule is certainly desirable, and I believe that it is imperative, for the reason that the constitutional equality of the States requires that each subject of controversy shall be determined by a general principle of law, so that like rights and duties shall be attributed to each State.[2]

[1] *Supra*, Sec. 26. [2] *Supra*, Sec. 25.

38. What general principle should the Supreme Court announce as the governing rule in Kansas *v.* Colorado?

"The unquestioned rule of the common law," says the court in a recent case, "was that every riparian owner was entitled to the continued natural flow of the stream * * * While this is undoubted, and the rule obtains in those States of the Union which have simply adopted the common law, it is also true that as to every stream within its dominion a State may change this common law rule, and permit the appropriation of the flowing waters for such purposes as it deems wise." [1]

In several States and Territories this common law rule has been superseded by what is called the doctrine of appropriation, the gist of which seems to be that the first comer may divert as much water from a stream as is necessary for the development of his mining or agricultural lands, whether these are adjacent to the stream or not, and later comers acquire rights in the order of priority.

The Court will find no proper rule in a strict adherence to either of these doctrines. Approval of the common law might bar a State from a reasonable use of water for irrigation. Approval of the law of prior appropriation would encourage interstate races for water prizes, contrary to the fraternal purpose of the Federal compact. Furthermore, this law might permit a lower State to assert against an upper one a right to receive only so much water *in* a stream as is actually diverted *from* the stream. Such a rule would be unfair, even in the arid regions. In the country at large it would be most mischievous, because it ignores, among other things, the utility of streams for the transportation of logs, as natural drains, and their influence on climate.

39. From these inadequate theories of domestic law we turn to international law.

Complaints by one nation against another on account of diversion of water are not unknown. Our State Department has complained to Great Britain of an obstruction to the flow of a stream in Maine caused by acts committed in Canada, and to Mexico of the diversion of waters from the Rio Grande.[2] Mexico has complained of diversion on this side of the boundary, and our Senate has under consid-

[1] U. S. *v.* Rio Grande Irrigation Co. 174 U. S. 702.

[2] Wharton's International Law Digest, sec. 20.

eration the appointment of a commission to discuss international water rights with Canada.

The interesting point in such cases is the invocation of the principle of a common right in international water courses. In respect of navigation this right has long been asserted by enlightened jurists, and throughout the greater part of the civilized world it is now either respected on principle or secured by agreement. Serious diversions of international streams have been too infrequent, perhaps, to excite much attention, but were such a case brought to arbitration the tribunal would surely refuse to announce, as a principle of international law, that an upper state is entitled to divert all the water from a stream. It would probably affirm the right of the state to divert a reasonable quantity, subject always to the paramount interest of navigation.

40. The physical and political conditions which make the irrigation of our arid region so difficult an undertaking are nowhere paralleled in a civilized country more closely than in Australia, where, indeed, the union of the colonies under the Constitution of the new Commonwealth was partly inspired by the desire to refer intercolonial disputes over waters to a common authority.[1] A learned commentator on the Australian Constitution says:

"The consideration of the extent of the restriction imposed upon the Parliament of the Commonwealth by section 100[2] of the Constitution involves the consideration of the question of the power of a State to authorise the diversion of the waters of a river flowing through it, or a diminution of their quality, to an extent which would affect the rights of riparian proprietors in another State. There is not any restriction directly and expressly imposed by the Constitution upon the several States in respect of their use of the rivers of the Commonwealth for the purposes of conservation or irrigation, but it would be an anomalous result if each State has the power under the Constitution to divert the water of a river for the benefit of the residents of the State, or to diminish the quantity of it, to the detriment of the residents of another State, whether the river is navigable or not, and that the Parliament of the Commonwealth cannot for any purpose that would be beneficial to all the States, or to a majority of them, do the same thing. It has already been stated that the imposition of the restriction imposed on the Parliament of the Commonwealth by section

[1] Bryce, Studies in History and Jurisprudence, 306.

[2] "The Commonwealth shall not, by any law or regulation of trade or commerce, abridge the right of a State or of the residents therein to the reasonable use of the waters of rivers for conservation or irrigation."

100 implies that, in the absence of any such restriction, Parliament would have a larger power to control the use of the waters of the rivers of the Commonwealth than that which the Constitution has conferred upon it; and the terms in which the restriction is imposed indicate that such larger power would be exercisable by the Parliament of the Commonwealth as a part of its legislative power with respect to trade and commerce between the States and with other countries. But the Constitution has not conferred any legislative power upon the States with respect to such trade and commerce; and the power of the Parliament of the Commonwealth with respect to that matter is from the nature of the power necessarily exclusive.

If the several States were so many independent nations, any interference in one of the States with the waters of a river that flowed through that State and another State, to an extent that would produce any damage to the riparian proprietors in the other State, would be a matter of international complaint for which redress in the last resort would be sought by war. But the States of the Commonwealth are constituent parts of the same nation, *and any act on the part of any one of them which inflicts injury on the residents of another State of the Commonwealth, and which would be a matter of international complaint, if the two States were separate and independent nations, is a matter for redress in the High Court of the Commonwealth under the provision of the Constitution which confers upon that Court jurisdiction in all matters between States.* It has been decided by the Supreme Court of the United States of America that under the provisions of the Constitution of that country which extends the judicial power of the United States to 'controversies between two or more States' one State may file a bill in equity against another State to determine the question of a disputed boundary. Under the Constitution of the Commonwealth the High Court has clearly jurisdiction to determine a similar dispute between two States of the Commonwealth, and it must as a logical sequence, have jurisdiction of the question whether any portion of the territory within the boundaries of one State can be deprived of all that makes that portion of its territory valuable by the aggressive legislation of another State."[1]

The words I have italicized seem to anticipate for the High Court of Australia a broader jurisdiction than our Supreme Court possesses,[2] and if this anticipation be realized it will be because the States of Australia are of lesser dignity than ours. In point of law the Commonwealth of Australia is a colony of Great Britain, formed by the union of several colonies, and receiving its Constitution from the British Parliament, while sovereign States adopted our Constitution, reserving important powers to themselves. But the last sentence of Judge Clark's comment suggests

[1] Judge A. Inglis Clark, Studies in Australian Constitutional Law, p. 110.

[2] *Supra*, Sec. 19. Compare Professor Moore's observations, *supra*, Sec. 32*a*.

a question within the jurisdiction of our Supreme Court; and I think it admits of but one answer. Assuming that this question is involved in Kansas *v.* Colorado the court should announce, as a general proposition of law, that one State cannot maintain against another a right to divert all the water of an interstate stream within its dominions, and go on to complete an equitable rule for the enjoyment of interstate waters by declaring that, presumably, each riparian State may divert a portion. Thus the principle of proportional rights, commended by international law to independent sovereigns, will be adjudged to be the general rule between our States. This rule is not reducible to a practical formula. How it shall be applied in a given case, whether, peradventure, it shall be found applicable at all, will depend upon the result of a thorough investigation of the relative resources and needs of the States in controversy, for the equitable purpose of the rule would be defeated were its applications invariably treated as purely mathematical problems. The equitable right may differ widely from the mathematical proportion.

Method of Relief.

41. Kansas prays that the State of Colorado be restrained from authorizing any person or corporation to divert water from the Arkansas River, except for domestic use; from granting any larger use, or any renewal of present irrigation privileges; and from constructing and operating irrigation works on State account. In fact, the Supreme Court is asked bluntly to enjoin the legislature of Colorado from passing laws of a certain description. Fortunately, we need not inquire how the court would attempt to muzzle a State legislature, or punish disobedient legislators for contempt.[1] Should the court decide that a further diversion of water will inflict an injury on Kansas it can grant relief without impairing the sovereignty of Colorado, even if the legislature should be tempted to disregard the decision.

Conceding that an injunction against the State of Colorado could not be directed specifically to its legislature, it would, nevertheless, pave the way to adequate relief. Our

Supra, Sec. 40. [1] *Supra*, Secs. 28, 29.

courts are incompetent to prevent the passage of an act by a sovereign legislature; this incompetency is common to courts the world over: But they are competent to declare a passed act to be no law; this competency is unique, and is due to our peculiar custom of confiding to the judiciary the power of determining the obligations of constitutions.[1] The Supreme Court would not stretch its powers by ignoring statutes passed by Colorado in contempt of a decision stigmatizing them as violative of the constitutional equality subsisting between it and another State: And then the court could prevent any State official, or private person from diverting water under the pretended authority of an act. This coercion of the servants or grantees of the State need not attaint its dignity in any forbidden manner. A court that has given judgment in ejectment against the commandant of a United States military station and cemetery at the suit of a claimant, despite the protest of the Federal Government,[2] will find a way to prevent a person in Colorado from bringing water into a ditch.

Relief for the complainant in the case at bar seems to require no more serious intervention in State affairs than was contemplated in Missouri *v.* Illinois. As the court there denied the power of a State legislature to authorize a nuisance to property in a neighbor State, so here it may deny the power to authorize what is, in effect, a trespass upon such property. In Missouri *v.* Illinois, the court said:[3]

"We are dealing with the case of a bill alleging in express terms that damage and irreparable injury will naturally and necessarily be occasioned by acts of the defendants, and where the defendants have chosen to have their rights disposed of, so far as the present hearing is concerned, upon the assertions of this bill";

and in that case the demurrers were overruled, and leave given the defendants to file answers to the bill. If the case of Kansas *v.* Colorado takes this course the principle of proportional rights in interstate waters will be established, leaving the question as to its application in the case at bar to be determined in further proceedings.

[1] The courts of the Commonwealth of Australia have power to invalidate acts of the federal and state legislatures for repugnancy to the constitution, but the conditions are not precisely the same as those under which our courts act, Australia being, in theory of law, still a dependency of Great Britain. [2] U. S. *v.* Lee, 106 U. S. 196. [3] 180 U. S. 248.

41*a*. The greater part of sections 30–41 was substantially finished when, on April 7, the Supreme Court gave its opinion in Kansas *v.* Colorado and I let them stand, because, while the court overrules the demurrer of Colorado, it suspends judgment, not only on the merits of the case, but on the main questions of law. Chief Justice Fuller says:

"Applying the principles settled in previous cases, we have no special difficulty with the bare question whether facts might not exist which would justify our interposition, while the manifest importance of the case and the necessity of the ascertainment of all the facts before the propositions of law can be satisfactorily dealt with, lead us to the conclusion that the cause should go to issue and proofs before final decision. * * *

"Without subjecting the bill to minute criticism, we think its averments sufficient to present the question as to the power of one State of the Union to wholly deprive another of the benefit of water from a river rising in the former, and, by nature, flowing into and through the latter, and that, therefore, this court, speaking broadly, has jurisdiction.

"We do not pause to consider the scope of the relief which it might be possible to accord on such a bill. Doubtless the specific prayers of this bill are in many respects open to objection, but there is a prayer for general relief, and under that, such appropriate decree as the facts might be found to justify, could be entered, if consistent with the case made by the bill, and not inconsistent with the specific prayers in whole or in part, if that were also essential. Tayloe *v.* Insurance Company, 9 How. 390, 406; Daniell, Ch. Pr. (4th Am. ed.) 380. * * *

"Sitting, as it were, as an international, as well as a domestic tribunal, we apply Federal law, State law, and International law, as the exigencies of the particular case may demand, and we are unwilling, in this case, to proceed on the mere technical admissions made by the demurrer. Nor do we regard it as necessary, whatever imperfections a close analysis of the pending bill may disclose, to compel its amendment at this stage of the litigation. We think proof should be made as to whether Colorado is herself actually threatening to wholly exhaust the flow of the Arkansas River in Kansas; whether what is described in the bill as the "underflow" is a subterranean stream flowing in a known and defined channel, and not merely water percolating through the strata below; whether certain persons, firms, and corporations in Colorado must be made parties hereto; what lands in Kansas are actually situated on the banks of the river, and what, either in Colorado or Kansas, are absolutely dependent on water therefrom; the extent of the watershed or the drainage area of the Arkansas River; the possibilities of the maintenance of a sustained flow through the control of flood waters; in short, the circumstances, a variation in which might induce the court to either grant, modify, or deny the relief sought or any part thereof.

"The result is that in view of the intricate questions arising on the

record, we are constrained to forbear proceeding until all the facts are before us on the evidence.

"*Demurrer overruled, without prejudice to any question, and leave to answer.*"

IV.

COMPREHENSIVE IRRIGATION.

42. The affirmance of a right in each State traversed by an interstate stream to a reasonable use of its waters might of itself somewhat embarrass the further irrigation of arid lands by afflicting States with uncertainty in the face of a substantial, yet unascertained limitation upon their powers of diversion.

It is to be hoped that this embarrassment will be sufficiently serious to compel the adoption of means whereby the reasonable apportionment of water among the States of the arid region shall be effected under a comprehensive system of irrigation for which science must present the plans, and law provide for their execution. While understanding that no scheme, however admirable in theory, is likely to remove all interstate differences regarding the use of water in an arid region, it should be possible to devise a system that will impound the available supply and distribute it with approximate fairness.[1] A system broad and far-reaching in conception, looking ultimately to the utilization of all available waters, and taking no account of State lines except in the important matter of apportionment.

43. The first question of law in regard to the system is whence shall come the power to authorize it. Not unnaturally there is some disposition to turn to the Federal government. As the proprietor of vast tracts of arid land within the States, and as the ruler of Territories which should be included within the system the direct interest of

[1] Mr. F. H. Newell, of the U. S. Geological Survey, says that private enterprise "has already built irrigation works sufficient to utilize nearly the whole available flow of the streams in the arid regions during the irrigation season. Further progress in irrigation can only come through the storage of flood waters in reservoirs" (Irrigation in the United States p. 405). In regard to the volume of these flood waters President Roosevelt says in his message of December 3, 1901, "The western half of the United States would sustain a population greater than that of our whole country to-day if the waters that now run to waste were stored and used for irrigation."

this government is very great, to say nothing of its general concern in the opening of new regions to settlement. But the system will necessarily affect property within State jurisdiction, and the Federal government is incompetent to enter a State and override its laws in order to promote irrigation. The implications of the Constitution do not confer upon Congress any power in respect of State waters except in the matter of navigation.

Perceiving the inability of the Federal government to invade a State and distribute its waters, and realizing the inability of the States to secure an equitable apportionment of water by independent action, we are led to inquire whether the requisite authority for comprehensive irrigation may not be derived from a compact between the States interested, in which the Territories, or the United States, as their representative, shall join. In Article I, Sec. 10 of the Constitution we read:

"No State shall enter into any treaty, alliance, or confederation * * * No State shall without the consent of Congress * * * enter into an agreement or compact with another State or with a foreign power."

The distinction between the "treaty, alliance, or confederation" absolutely forbidden, and the "agreement or compact" conditionally permitted is not obscure. The United States will not tolerate an *imperium in imperio*, or any combination of States against other States, or any connection between a State and a foreign country. But compacts not compromising the supremacy of the United States over the several States, or the equality of the States among themselves, may be made with the consent of Congress. And it seems that in some cases this consent need not be given in advance, as where the "agreement relates to a matter which could not well be considered until its nature is fully developed," and sometimes, indeed, consent may be established by implication.[1]

Compacts or agreements between States have occasionally been made, and usually deal with boundary questions. But there is no reason why States should not combine to secure a more equitable enjoyment of a common interest in water than is attainable by independent action, and I venture to outline a plan whereby this object may be realized.

[1] See Virginia *v.* Tennessee, 148 U. S. 521.

44. Let the States and Territories interested make a compact creating a public corporation for the promotion of irrigation. This corporation shall be charged, at all events, with the planning, constructing and maintaining of a comprehensive system, and with the general apportionment of water among the several parties to the compact. But it may appear that the local distribution of a State's share will be best administered at the State's discretion, leaving it free to utilize public or private agencies acting under its own laws and customs.

The governing body of the corporation must be impartial as between the States, and this requisite suggests that the power of appointing its members be conferred upon the Federal government which shall select them from non-residents of the States interested.

The governing body must be inspired by the best scientific knowledge, and this points to the selection of some of its members at least from the corps of scientists and engineers in the federal service. Each State should have a representative near the governing body for purposes of suggestion and consultation.

Considerations of economy and of normal development require that the work of actual construction shall be gradual, but surveys should be made at once for a system adequate to collect and conserve the whole supply of water available for irrigation, and locations for reservoirs and arterial canals be pre-empted by acquisition, if on private, by reservation if on public land.

45. The powers of the corporation would depend, of course, upon the compact and upon such ancillary State and Federal legislation as might be advisable, and any suit at law involving their exercise would be justiciable in the Federal courts. One power, however, should be specially remarked even in this brief sketch—the eminent domain. States wherein irrigation is deemed of vital importance are wont to authorize the expropriation of land for the necessary works, and the Supreme Court has sustained State tribunals in treating this as a taking for public use.[1]

[1] Fallbrook Irrigation District *v.* Bradley, 164 U. S. 112.

The power of expropriation must be enjoyed by the corporation in question, and it must emanate from the States, because the Federal government is not empowered to exert its eminent domain in a State except for Federal uses. Now it is settled that a State can neither lend its eminent domain to promote the public uses of another State, nor exert it in another to promote its own, for each person holds his property subject only to the needs of his own sovereign. Yet the corporation must be free to locate irrigation works, and provide for the distribution of water, regardless of States lines—for example, it may be advisable to build a reservoir in Colorado and utilize the water in Kansas. At first blush this might seem irregular, but, comprehending that each reservoir and canal is but a section of a great system intended to distribute to each State a fair proportion of interstate water, not otherwise obtainable, it is perceived that there is really no question of expropriation for foreign use; there is a joint exercise of the eminent domain by several States for the common benefit.

Some years ago I inquired "whether an undertaking considered as a whole may not be a public use common to two States, so that joint and interdependent grants of the eminent domain may cure deficiencies incident to independent grants."[1] Such a possibility is plainly contemplated in the following observation of the Supreme Court regarding a supposed case calling for a joint use of State powers, including, in all probability, the eminent domain:

> "If the bordering line of two States should cross some malarious and disease producing district, there could be no possible reason, on any conceivable public grounds, to obtain the consent of Congress for the bordering States to agree to unite in draining the district, and thus removing the cause of disease."[2]

In case the exigencies of the system demand the appropriation of private irrigation works, here and there, these may be taken on payment of just compensation.

46. I shall not consider now the problems of finance, or the practical rule for the just apportionment of water, or the method of dealing with vested rights in private

[1] The Law of Eminent Domain, sec. 29.

[2] Virginia *v.* Tennessee, 148 U. S. 518.

works of irrigation and with the public domain of the United States, but we may anticipate that a disinterested corporation of comprehensive scope and power will handle all vexatious questions with greater skill than can be applied under present conditions, which, if report be true, too often encourage a rough contest for water. My interest in the practical side of irrigation is satisfied for the present by a very broad suggestion of method for effectuating the principle of proportional rights in interstate waters which, I trust, will yet be declared by the Supreme Court in Kansas *v.* Colorado.

V.

General Conclusions.

47. The principle of proportional rights in interstate waters is of far-reaching importance. We Americans are coming to realize, what has long since impressed itself in crowded countries, that consumption tends to press more and more seriously upon very important national resources. We are beginning to perceive that prevision and thrift must replace the hand to mouth habit so naturally acquired by a small community scattered through a vast and rich domain, and so difficult to shake off as the community increases. Among all our resources water is unique. It is necessary to our existence; for some of its utilities there is no possible substitute; it is the only one that distributes itself.

Evidently a resource of such transcendent value and peculiar distribution may be of interstate concern in various ways. The Supreme Court has already recognized a State's interest in the quality of interstate waters by denying the right of another State to authorize their pollution to the danger point.[1] Regarding the quantity of water, it may be decided some day that States traversed by an interstate stream have an interest in the conservation of its supply that will enable a lower State to restrain an upper one from permitting the depletion of its sources through the wasteful cutting of forests. But be this as it may, actual diversion by an upper State to an unreasonable and injurious extent should be preventible through interstate suit, whether the object of diversion be the irrigation of

[1] Missouri *v.* Illinois, 180 U. S. 208.

arid lands, as in Kansas *v.* Colorado, or the supply of cities, or the creation of hydraulic power.

48. Conversely, it is quite as important that an upper riparian State should be entitled to effect a reasonable diversion of water. While it may be prevented from abusing a natural advantage by diverting all the water, the use of this should not be prohibited altogether. Upper States must not be barred from taking a reasonable advantage of their situation, in order that the lower States may enjoy an opportunity to divert the entire natural flow.

To illustrate the general subject, let us consider the case of Pine and Muller *v.* The City of New York just decided by the United States Supreme Court.[1] The Byram River is a small stream, the West branch of which rises in New York, the East in Connecticut. These branches meet at a point in Connecticut, whence the stream runs a short course to Long Island Sound. The city, acting under the authority of the New York legislature, has nearly completed a dam across the West branch, a few hundred feet from the Connecticut line, for the purpose of impounding and diverting water to the use of its inhabitants. The city admits that, at certain times perhaps all the water above the dam will be diverted, leaving the stream to be supplied from the East branch, and from such water of the West branch as may rise below the dam. The plaintiffs own land on the main stream, which will suffer substantial injury by reason of the diversion. They could not agree with the city in regard to compensation. They refused to go to the New York courts for an assessment of damages under the New York statutes, and filed a bill for injunction in the Circuit Court of the United States. The injunction was granted;[2] it was affirmed by the Circuit Court of Appeals;[3] and the case was brought to the Supreme Court on *certiorari*. The Court found that the plaintiffs had not been diligent in asserting their rights, but had allowed large expenditures to be made on a work of great public concern without due protest. For this reason it remanded the case to the Circuit Court in order that the plaintiffs' damages, if

[1] April 7, 1902. [2] Pine *v.* N. Y. 103 Fed. Reporter, 337.
[3] 112 Fed. Reporter, 98.

any, might be ascertained. After damages shall have been assessed either in equity, or, if the plaintiffs prefer, by a jury, the city, upon paying them, will be entitled to divert the water; if it does not pay within a fixed time it will be enjoined.

49. The disposition of Pine *v.* New York made it unnecessary for the Court to decide the interesting questions of law argued, but it said speaking by Justice Brewer:

"We assume, without deciding, that, as found by the Circuit Court, the plaintiffs will suffer substantial damage by the proposed diversion of the water of the West Branch. Also, without deciding, we assume that, although the West Branch above the dam and all the sources of supply of water to that branch are within the limits of the State of New York, it has no power to appropriate such water or prevent its natural flow through its accustomed channel into the State of Connecticut; that the plaintiffs have a legal right to the natural flow of the water through their farms in the State of Connecticut, and cannot be deprived of the right by and for the benefit of the City of New York by any legal proceedings either in Connecticut or New York; and that a court of equity, at the instance of the plaintiffs, at the inception and before any action had been taken by the City of New York, would have restrained all interference with such natural flow of the water."

If the above statement presents the mature opinion of the Court it is conceivable that a single riparian proprietor in one State may retard the growth, if not menace the health of a great city in another State by preventing access to a supply of water which may be the only one available from an economic, perhaps even from a physical standpoint.

May such a hardship be avoided by holding that the property right of the riparian owner is merely in the water itself, and not in its flow; and that, therefore, while this water is in an upper State it may be taken for public use by that State? If so, the owner is simply in the position of a non-resident whose property is subject to expropriation in the State where it lies, or, as we should say here, where it is caught, and he must submit to the rule of that State's laws. This view was advanced by Judge

Wheeler of the Circuit Court of Appeals, who said in a dissenting opinion in Pine *v.* New York:

"The defendant has done nothing in question here outside the State of New York; the deprivation of water complained of was wholly within that State; and if the plaintiffs have any rights in the water taken they exist in that State, and were subject to, and were taken under the eminent domain of that State."

I do not think the Supreme Court should approve, or does approve Judge Wheeler's proposition. On the contrary, I think that the assumptions of the Court in Pine *v.* New York, which I have quoted, must be accepted as positive affirmations of law. It must be understood that when a private suitor is quick to defend his interests the Court will neither override the common law in respect of riparian rights, nor revolutionize the theory of the eminent domain by permitting one State to condemn property in another, even to prevent the embarrassment of a great community by a stubborn individual.

Yet, when we contemplate the fraternal relation of the States, and the welding of their people into a single nationality by a common allegiance, it is inconceivable that any one of these States should be barred from making a use of water, thoroughly reasonable from any standpoint and vitally important from its own, by a citizen in another State who chooses to oppose his petty interest. In my opinion such a hardship can be avoided by invoking the principle of proportional rights in interstate waters which I have endeavored to establish. If a State be pressed by reasonable necessity to divert water from an interstate stream, and find its purpose likely to be balked by persons in a lower State, let it file an original bill in equity against that State for the ascertainment of its proportional right.

In adjudicating this interstate suit the Court will be free to apply the principles of international law[1] and will ascertain, approximately, the share of the complainant State in the stream. The interstate controversy will then be determined. But the Court may deem it inequitable to allow the complainant to take its share, apportioned with respect to the broad requirements of States, without regard to private

[1] See *supra*, secs. 25, 26, 39, 40.

interests in the lower State. For I am not prepared to say that when the rule of proportional rights is applied to a stream by allowing to the upper State, for example, one-third of the volume, it should be presumed that a riparian proprietor in the lower State was never entitled at common law to but two-thirds of the actual flow, the other third having come by grace. Generally speaking, I prefer to consider an interstate water suit as a method for relieving a public emergency and laying down a rule for public guidance with the least possible disturbance of established private interests in either State, and this view is justified on broad principles of public policy. If, therefore, the Supreme Court finds that persons in the lower State will be deprived of property by the diversion of water, it may order an assessment of damages, and their payment by the complainant State before it exercises its rights. While the result will be that private property in one State is, in fact, taken for public use in another, there will be no technical violation of the law of eminent domain. The case will be not unlike an international negotiation culminating in a treaty, wherein private interests are subordinated to public exigencies with this difference, perhaps, that here the persons affected may be assured of receiving full compensation.

50. By the preservation of sources, the storing of flood waters, and, always, by economy of use the supply of waters should be conserved in the regions where the demand is large and increasing. But, however strictly these practices shall be followed, interstate water controversies in other sections of our country than the arid region, and for other purposes than irrigation are not improbable. We should anticipate their adjustment by the principle of proportional rights, equitably applied in each case with regard to the facts.

CARMAN F. RANDOLPH.

New York, April–May, 1902.